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BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

CV-09-2261 (JBW)

MICHAEL MINEO,

:

PLAINTIFF,

:

V.

U.S. Courthouse
Brooklyn, New York

CITY OF NEW YORK, ET AL.,

:

DEFENDANTS.

:

December 2, 2010
9:30 o'clock a.m.

:

X
TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES DISTRICT JUDGE and a jury

APPEARANCES:

For the Plaintiff: STEPHEN C. JACKSON, ESQ.
KEVIN L. MOSLEY, ESQ.

For the Defendant: JOHANA CASTRO, ESQ.
KARL J. ASHANTI, ESQ.
ADAM DEITCH, ESQ.
For NYC

MITCHELL GARBER, ESQ.
GREGORY M. LONGWORTH, ESQ.
For Deft Kern

Court Reporter: Sheldon Silverman
(718) 613-2537

Proceedings recorded by mechanical stenography, transcript
produced by CAT.

1 THE COURT: Good morning. It's been reported to
2 the court the underwear involved in this case is missing; is
3 that correct?

4 MR. JACKSON: Yes, Judge.

5 THE COURT: Will the Clerk of the Court give his
6 name?

7 MR. KESSLER: Stanley Kessler.

8 THE COURT: Is the box here with the materials?

9 MR. JACKSON: No, your Honor.

10 MR. KESSLER: I took custody, placed it in the
11 robing room.

12 THE COURT: Robing room?

13 MR. KESSLER: Yes.

14 THE COURT: Bring it in, please.

15 (Pause.)

16 THE COURT: Thank you. Place the box on the table.
17 Mark it Court Exhibit 1 of today's date.

18 When did you take custody of this box?

19 MR. KESSLER: At the end of the trial day after the
20 trial was concluded for the day.

21 THE COURT: Yesterday?

22 MR. KESSLER: Yes, sir.

23 THE COURT: Was it in this condition, opened with
24 material sticking out of it?

25 MR. KESSLER: Judge, as it is now.

1 THE COURT: Did you look in or do anything to it?

2 MR. KESSLER: No, I did not.

3 THE COURT: From whom did you get the box?

4 MR. KESSLER: I'm having trouble recalling just
5 now.

6 THE COURT: Was it defense counsel or plaintiff's
7 counsel?

8 MR. KESSLER: I'm having trouble recalling right
9 now.

10 THE COURT: Can't hear you.

11 MR. KESSLER: I can't recall.

12 THE COURT: The box was at the plaintiff's table as
13 I observed when we came to the end of the proceedings
14 yesterday, correct?

15 MR. JACKSON: That's correct.

16 THE COURT: At that time you reported that the
17 underwear was missing?

18 MR. JACKSON: Yes, Judge.

19 THE COURT: You made that report?

20 MR. JACKSON: Made the report, yes.

21 THE COURT: You examined the box?

22 MR. JACKSON: Examined the box, examined it
23 thoroughly, opened up all the packages that came in the box.
24 Actually, the contents were initially sealed in plastic. I
25 opened the plastic, removed the paper bags, opened the paper

1 bags and took out all the contents and noticed the underwear
2 was missing.

3 THE COURT: Where did you first come into
4 contact --

5 MR. JACKSON: When it was brought into the
6 courtroom by your courtroom deputy.

7 THE COURT: When?

8 MR. JACKSON: Yesterday.

9 THE COURT: What time?

10 MR. JACKSON: I don't recall the time.

11 THE COURT: That was Wednesday?

12 MR. JACKSON: Yes.

13 THE COURT: Was it sealed at that time?

14 MR. JACKSON: Yes, completely sealed.

15 THE COURT: It was sealed, turned over to you?

16 MR. JACKSON: Yes.

17 THE COURT: What time?

18 MR. JACKSON: Wednesday in the courtroom prior to
19 Mr. Mineo taking the stand -- Tuesday, I'm sorry, Tuesday.

20 THE COURT: Tuesday.

21 Ms. Ward, come forward, give your name.

22 MS. WARD: Teresa Ward.

23 THE COURT: Were you taking the place on Tuesday of
24 the regular courtroom deputy?

25 MS. WARD: Yes, Judge.

1 THE COURT: You were asked to bring the box from the
2 vault?

3 MS. WARD: Yes.

4 THE COURT: Who asked you to do that?

5 MS. WARD: Counsel here.

6 THE COURT: Which counsel, give his name.

7 MS. WARD: Plaintiff's counsel, Mr. Jackson, said
8 he went down to the clerk's office, they could not find what
9 he was looking for.

10 THE COURT: What time of the day on Tuesday was
11 that?

12 MS. WARD: This was after lunch, I believe, after a
13 break.

14 THE COURT: About 1:00 o'clock?

15 MS. WARD: We got back about -- maybe it was about
16 1:15.

17 THE COURT: Did you then go down to the clerk's
18 office?

19 MS. WARD: I went down to the clerk's office, found
20 out the box was in the vault, had to go to one of the
21 supervisors who have access to the vault. They handed me the
22 box. It was sealed, completely sealed: I brought the box up.

23 THE COURT: Did you sign for it?

24 MS. WARD: No, I asked them if they needed me to
25 sign for the box. They "No, we know Judge Weinstein has the

1 box ." I brought the box up in a sealed condition, put it on
2 the table right where it is now.

3 THE COURT: That's the table that plaintiff's
4 counsel has been using?

5 MS. WARD: Yes.

6 THE COURT: Who touched the box thereafter on
7 Tuesday?

8 MS. WARD: I left the courtroom.

9 THE COURT: Is that the last you had to do with the
10 box?

11 MS. WARD: The last I had to do with the box.

12 THE COURT: Thank you.

13 MS. WARD: You're welcome.

14 THE COURT: Who touched the box after that?

15 MR. JACKSON: We did. The box was sealed when it
16 was brought to the courtroom.

17 THE COURT: Tuesday?

18 MR. JACKSON: Tuesday.

19 THE COURT: What happened Tuesday night?

20 MR. JACKSON: I don't know -- the city took
21 possession --

22 MS. CASTRO: We had members from Internal Affairs
23 come, reseal the bag.

24 THE COURT: How had it been unsealed?

25 MS. CASTRO: It was unsealed on Tuesday.

1 THE COURT: Who unsealed it?

2 MR. JACKSON: Plaintiff's counsel, Mr. Jackson.

3 THE COURT: You unsealed it?

4 MR. JACKSON: Yes.

5 THE COURT: Did you examine the contents?

6 MR. JACKSON: Only removed at that time the asp.

7 THE COURT: But you didn't examine it to determine
8 if the shorts were there?

9 MR. JACKSON: No, I assumed everything was there.

10 THE COURT: You didn't seal it?

11 MR. JACKSON: I did not seal it.

12 THE COURT: You put the asp back?

13 MR. JACKSON: Asp back.

14 THE COURT: Didn't remove anything?

15 MR. JACKSON: Didn't remove anything.

16 THE COURT: At that point?

17 MS. CASTRO: At that point we had the contents
18 including the previous bag that had been sealed put into a new
19 plastic bag, resealed by Internal Affairs and then it was
20 taken and dropped off again in the morning at 9:30 yesterday.
I signed for it.

22 THE COURT: Who authorized you to remove it from
23 the courthouse?

24 MS. CASTRO: No one did, your Honor. I said I
25 would make arrangements. I told your law clerk I would have

1 it taken.

2 THE COURT: In the future nothing is to be removed
3 from this courthouse without the court's order.

4 Who had custody of it after you turned it over?

5 MS. CASTRO: Overnight?

6 THE COURT: Yes.

7 MS. CASTRO: Internal Affairs.

8 THE COURT: Have that Internal Affairs person
9 available. He needn't come in. Make inquiry to determine
10 whether he did anything with it. He didn't seal the box,
11 however?

12 MS. CASTRO: He did not take the box, only took the
13 contents that were all placed in the plastic bag.

14 THE COURT: Did he examine it to see if the
15 underwear was there?

16 MS. CASTRO: No, your Honor. Everything that was
17 in the bag was just sealed into a new plastic bag. We didn't
18 take inventory of it. We assumed everything was in the bag.

19 THE COURT: He put it back in the box?

20 MS. CASTRO: No, I placed the items when they were
21 returned from Internal Affairs in the morning on the bench.
22 Later at the end of the day, plaintiff's counsel placed it
23 back in the box.

24 THE COURT: This was on Wednesday?

25 MS. CASTRO: Yes.

1 THE COURT: When you looked into the box to
2 determine if the shorts were there, the box was unsealed?

3 MR. JACKSON: Box was unsealed.

4 THE COURT: But was there a sealed new container as
5 described by defense counsel?

6 MR. JACKSON: I don't recall if it was a newly
7 sealed container. I do know -- I don't recall if it was
8 sealed or not.

9 MS. CASTRO: Another procedure we used throughout
10 the last trial, have Internal Affairs come pick up the items,
11 drop them off again in the morning.

12 THE COURT: I'm not criticizing anyone. I just
13 want to get the facts. I'm not making a thorough inquiry.

14 What does counsel suggest be done? I'll hear from
15 counsel for the plaintiff.

16 MR. JACKSON: We're nonplussed as to what happened.
17 We certainly weren't using the underwear in the examination of
18 plaintiff. Obviously it's an integral piece of evidence that
19 everyone relies upon in this case, arguing one way or the
20 other. Again, I've never been involved in a case where
21 evidence disappeared. I'm nonplussed as to actually what to
22 do.

23 THE COURT: Would you consult with your client and
24 cocounsel and tell me what you recommend the court do, if
25 anything, at this stage?

1 MR. JACKSON: Initially to conduct an investigation
2 to find out what happened.

3 (Pause.)

4 THE COURT: Ms. Ward, you may leave.

5 MS. WARD: Thank you.

6 MR. JACKSON: Your Honor, our initial inclination,
7 the court give an instruction to the jury with regards to the
8 missing underwear and explain it's not available; that through
9 no fault of either party so it won't be held against either
10 party, if they could deliberate on the photographs of the
11 underwear that are already in evidence.

12 THE COURT: You're not suggesting FBI
13 investigation?

14 MR. JACKSON: I do suggest an investigation.
15 Obviously I want to get to the bottom of this. If the court
16 remembered earlier, requested the underwear be turned over to
17 the FBI for investigation.

18 THE COURT: I don't know whether it was in the
19 sealed box when it was sealed and I'm not making that
20 investigation at this time. I don't want to get further
21 involved in the matter.

22 What is the view of the individual defendant's
23 counsel?

24 MR. GARBER: I think Mr. Jackson's suggestion is a
25 well-reasoned suggestion. I only put out for the court's

1 consideration maybe one brief interim step before we get to
2 something of that nature.

3 I think, based upon my educated guess, is a
4 reasonable likelihood that that underwear in a separate sealed
5 container is still in this building, perhaps in the clerk's
6 office, but not in that box that is the box on counsel's table
7 right now.

8 THE COURT: The clerk will thoroughly search to see
9 if there is such a sealed container containing the underwear
10 and make inquiry of the United States Attorney's office to see
11 whether perhaps it may have been turned over to the FBI for
12 investigation for the forensic laboratory.

13 Is that appropriate?

14 MR. GARBER: Yes.

15 THE COURT: Both sides say yes?

16 MR. JACKSON: Yes.

17 THE COURT: You'll take care of that, sir?

18 MR. KESSLER: Yes.

19 MR. GARBER: The name of the Assistant United
20 States Attorney who I think would be the person to contact is
21 Pamela Chen, C H E N, the head of the Civil Rights Unit of the
22 United States Attorney's office of the Eastern District of
23 New York. I did speak to her approximately six to eight weeks
24 ago to see whether or not anything had happened. As of that
25 conversation, which was very brief in duration on the

1 telephone, she indicated to me she believed the underwear was
2 still here in the courthouse. Perhaps an inquiry with
3 Ms. Chen can add some light.

4 THE COURT: Would you also search carefully
5 Ms. Lowe's office. She's on leave at the moment. It's
6 unlikely she has anything in her office but check all the
7 files, anyplace it might possibly be. Then check whatever
8 sources there are in the court where it might be and check
9 with the United States Attorney, please.

10 MR. KESSLER: Yes.

11 THE COURT: Thank you.

12 Any suggestion from counsel for the Corporation
13 Counsel?

14 MS. CASTRO: I want to add I do agree apart from
15 also checking in Ms. Lowe's office, if we could possibly
16 inquire with her because my recollection from the last trial
17 is that all the materials were in the bag and at some point
18 the jury asked to see the underwear. At that point Ms. Lowe
19 took it to the jury room and she held it for them rather than
20 have them handle it. That's why I think the underwear is
21 possibly in a separate container. It was separated from the
22 jeans and the asp.

23 THE COURT: We'll check it. She's on leave. She
24 was contacted by phone and indicated she had no view of what
25 happened, but should there be an investigation, anything

1 further, she may be contacted. The court will not make any
2 further contact.

3 Anything further?

4 MR. JACKSON: A couple of things. With regards to
5 the court's --

6 THE COURT: We have a memorandum from the
7 defendant.

8 MR. JACKSON: Proposed jury charge.

9 THE COURT: On the state charge.

10 MR. JACKSON: If I could be heard?

11 THE COURT: We'll go through the charge page by
12 page and I'll bring that up then.

13 I have the proposed court's charge which is Court
14 Exhibit number 5, 12-01.

15 Have you all got the charge?

16 MS. CASTRO: Yes.

17 MR. GARBER: We're getting our copy. I apologize.

18 (Pause.)

19 MR. GARBER: In the meantime, not to waste any
20 time, I'll sit in with cocounsel at this point. Thank you,
21 your Honor.

22 THE COURT: Marked as defendant's supplemental
23 proposed jury charge, Officer Kern, state law tort claim,
24 Court Exhibit 1 of today's date.

25 THE CLERK: You asked me to mark the boxes.